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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-689

JASPER J. MIRABILE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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OCTOBER TERM, 1974

No.

JASPER J. MIRABILE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Jasper J. Mirabile, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, affirming a judgment of the United States District Court for the Western District of Missouri dated October 15, 1974, convicting him of a violation of 18 U.S.C. §1341.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, not yet officially reported, is reported herein as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on October 15, 1974. A timely petition for rehearing was denied on November 7, 1974 and is reported herein as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether a scheme to defraud the State of Missouri by the submission of false sales tax returns by mail is within the ambit of the Federal Mail Fraud Statute when the State of Missouri has previously enacted criminal sanctions for the underpayment of said tax.

(2) Whether the Mail Fraud Statute applies to this case where the mailings bore no practical or purposive relationship with the scheme to underpay the taxes and were purely incidental and collateral.

(3) Whether the Court below erred in denying petitioner's Motion to Dismiss the Indictment for Selective and Discriminatory Prosecution.

STATEMENT OF THE CASE

Petitioner, Jasper J. Mirabile, was indicted by the Grand Jury of the United States District Court for the Western District of Missouri and charged with mail fraud

in violation of 18 U.S.C. §1341. He was charged with devising a scheme to defraud the State of Missouri by fraudulently understating the Missouri State Sales/Use Tax Returns of Jasper's Italian Restaurant, Inc., of which he is owner and operator, and for the purpose of executing such scheme caused 27 such returns to be mailed to the State of Missouri Department of Revenue.

He was tried before the Honorable Elmo B. Hunter and a jury and found guilty. Judgment was entered on May 3, 1974. He was sentenced to a five-year period of probation.

At trial, it was stipulated that the sales/use tax returns mentioned in the indictment were in fact understated in the amounts alleged and that defendant caused those returns to be mailed to the State of Missouri Revenue Department as alleged in the indictment.

The principal controversies raised regarding the indictment concerned whether the mail fraud statute, 18 U.S.C. §1341, could properly be invoked against the mailing of a tax return to the state revenue department by a citizen of that state, and whether the mailing in question was in furtherance of a scheme to defraud. These issues were raised by petitioner's pretrial motion to dismiss the indictment, and the District Court, in an opinion and order dated January 24, 1974, denied the motion. That decision is reported as *United States v. Mirabile*, 396 F. Supp. 1180 (W.D. Mo. 1974). Petitioner also moved for dismissal on the ground of selective and discriminatory prosecution. This motion also was denied.

REASONS FOR GRANTING THE WRIT

I.

A SCHEME TO DEFRAUD THE STATE OF MISSOURI BY THE SUBMISSION OF FALSE SALES TAX RETURNS BY MAIL IS NOT WITHIN THE AMBIT OF THE FEDERAL MAIL FRAUD STATUTE WHEN THE STATE OF MISSOURI HAS PREVIOUSLY ENACTED CRIMINAL SANCTIONS FOR THE UNDERPAYMENT OF SAID TAX.

Petitioner's prosecution was maintained under the federal mail fraud statute, 18 U.S.C. §1341, which provides in relevant part:

> "Whoever, having devised * * * any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses * * * for the purpose of executing such scheme or artifice or attempting to do so * * * knowingly causes to be delivered by mail * * * any * * * matter or thing" * * *.

The application of the mail fraud statute to the facts of this case represents a grave encroachment upon the prerogatives belonging to the criminal processes of the states. As such, it does violence to the sensitive constitutional balance of power between the federal government and the sovereign states.

The mail fraud statute has, with various modifications in language, been in force now for more than a century. Its intent was to *protect* the "Post Office Establishment" from "abuse" by those who would utilize correspondence with the intent to carry out a scheme to defraud. Act of June 8, 1972, 17 Stat. L. 323; later §5480 of the Revised Statutes; see *Stokes* v. *United States*, 157 U.S. 187

(1895). Throughout its history, it has been repeatedly emphasized that Section 1341 is not to be read as reaching all frauds, but is limited to those involving federal injury; where the abuse of the Post Office has been a necessary part of the execution of the fraud; leaving all other cases to be dealt with by appropriate state law. *Kann v. United States*, 323 U.S. 88, 95 (1944); *Parr v. United States*, 363 U.S. 370, 380 (1960); *United States v. Kelem*, 416 F.2d 346, 347 (9th Cir. 1969), *cert. denied*, 397 U.S. 952 (1969); *United States v. Maze*, 468 F.2d 529, 536 (6th Cir. 1972), *affirmed*, 94 S.Ct. 645 (1974). The statute, therefore, is aimed solely at the vindication of a distinctly federal interest, the mail system. It was never intended either to infringe upon state law enforcement, or even to be part of a scheme of federal-state cooperation. See *United States v. Sheridan*, 329 U.S. 379, 387 (1946).

In *Kann v. United States, supra*, the Supreme Court said, with regard to state jurisdiction in mail fraud cases:

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." 323 U.S. at 95.

The principle that local frauds should be prosecuted by local authorities rather than under the federal mail fraud statute is similarly expressed in *United States v. Kelem, supra*, and *United States v. Chason*, 451 F.2d 301, 204 (2d Cir. 1971), *cert. denied*, 405 U.S. 1016 (1971).

In *Kelm, supra*, at 347, the court said:

> "It is elementary that the jurisdiction of federal courts is defined and limited by the Constitution

> and congressional action; hence, statutes such as section 1341 should be carefully and strictly construed in order to avoid extension beyond the limits intended by Congress. Healy v. Ratta, 292 U.S. 263, 270, 54 S.Ct. 700, 78 L.Ed. 1248 (1933); Kline v. Burke Constr. Co., 260 U.S. 226, 233-234, 43 S.Ct. 79, 67 L.Ed. 226 (1922). Moreover, such construction is especially appropriate where, as here, the Government urges that we construe a federal criminal statute so that it reaches conduct which the states should appropriately control and which they can control, effectively. Indeed as the Supreme Court has emphasized, section 1341 is not designed to reach all frauds 'but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law.' "

Petitioner submits that it never has been the intent of Congress that the mail fraud statute be extended to situations involving the mailing of tax returns to state revenue departments, particularly so when the State of Missouri had previously enacted criminal sanctions for nonpayment of said taxes. Section 144.080 R.S. Mo.

The relation between federal and state jurisdiction is an extremely sensitive one which requires the continual alertness of the judiciary lest imbalances occur in the constitutional framework of the union. In the case of *Palmer v. Massachusetts*, 308 U.S. 79, 83-84 (1935) Justice Frankfurter said:

> "Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have

> one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. *Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.*" [Emphasis supplied]

This Court in *Rewis v. United States*, 401 U.S. 808 (1971), reversing the conviction of two Florida lottery operators of violating 18 U.S.C. §1952 (Travel Act), limited the further extension of federal jurisdiction in such cases:

> "Given the ease with which citizens of our Nation are able to travel and the existence of many multistate metropolitan areas, substantial amounts of criminal activity, traditionally subject to state regulation, are patronized by out-of-state customers. In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies." Id. at 811-12.

The desire to preserve this sensitive Federal-State-balance in the field of criminal jurisdiction was emphasized in the Supreme Court's decision of *United States v. Bass*, 434 F. 2d 1296 (2d Cir. 1970), *affirmed*, 404 U.S. 336 (1971). In *Bass*, the Court narrowly read the firearms provision, 18 U.S.C. §1202(a) to require a nexus between possession of a weapon and interstate commerce, rejecting the government's contention that the statute did not require such a showing of an interstate connection:

> "Because its sanctions are criminal and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress." *Id.* at 339.

The Court then reaffirmed in part its decision in *Rewis v. United States, supra*, stating that it would not assume that Congress intended to upset the delicate Federal-State balance unless clearly mandated by that body.

It is obvious that the rationale developed by the Supreme Court in *Rewis* and in *Bass* apply with equal or greater force to this indictment. Similarly, the conduct alleged in the indictment is "readily denounced as criminal by the States." *Bass, supra*, at 349. In view of the intense connection between the alleged acts and the interests of the State of Missouri, the blunt assertion of a minor federal interest would clearly "alter sensitive Federal-State relationships." *Bass, supra*, at 350.

The problems involved in the continual expansion of federal jurisdiction have been examined by Chief Justice Burger. See Burger, *The Courts on Trial*, 22 F.R.D. 71 (1970); *The State of the Judiciary*, 56 ABA Journal 929 (Oct., 1970).

A particularly compelling need, according to the Chief Justice, is to strike a "proper jurisdictional balance" between federal and state court systems whereby the state courts undertake, in appropriate areas, much of the nation's expanding litigation, criminal and civil. See, Burger, *Has the Time Come?*, 55 F.R.D. 119, 120-21.

II.

THE MAIL FRAUD STATUTE DOES NOT APPLY TO THIS CASE WHERE THE MAILINGS BORE NO PRACTICAL OR PURPOSIVE RELATIONSHIP WITH THE SCHEME TO UNDERPAY THE TAXES AND WERE PURELY INCIDENTAL AND COLLATERAL.

Petitioner submits that the mailings involved here were in no sense an integral part of the scheme to underpay the State of Missouri and in no way contributed to its success. Almost thirty years ago Mr. Justice Roberts wrote for the Supreme Court that the mail fraud statute does not apply where the mailing is "merely incidental and collateral to the scheme and not a part of it." *Kann v. United States*, 323 U.S. 88, 95 (1944). Following *Kann*, the federal courts have acknowledged this, holding that for a mailing to be subject to federal prosecution it must be more than "incidental", "collateral" or "tangential" to the fraudulent scheme, *United States v. Chason*, 451 F.2d 301, 303 (2d Cir. 1971), *cert. denied*, 405 U.S. 1016 (1971), but must be significantly related to the success of the scheme "as a matter of practical good sense." *United States v. Brickey*, 296 F.Supp. 742, 748 (E.D. Ark. 1969).

The Supreme Court has twice recently taken the opportunity to underscore its disapproval of convictions based upon mailings which were not for the purpose of executing the scheme, as the statute requires. In *United States v.*

Maze, 94 S.Ct. 645, 651 (1974), Mr. Justice Rehnquist noted in the majority opinion that "Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used as a result of the scheme. But it did not do this, instead, it required that the use of the mails be 'for the purpose of executing such a scheme . . .'." What is required, he wrote, is that the mailings be "sufficiently closely related to respondent's scheme so as to bring his conduct within the statute." In *United States v. Miles*, ____ U.S. ____ (March 1974), the court summarily vacated a similar conviction and remanded it to the Eighth Circuit for reconsideration in light of its decision in *Maze*.

Under the facts of this case it is apparent at once that the use of the mail service was utterly tangential to the scheme alleged. Neither facility of execution nor deterrence of detection was in any way promoted by the mailing. The scheme was completely independent of the mode of transmittal to the State of Missouri. For any purpose connected with the scheme, personal delivery would have been no more or less related to the success of the underpayment scheme.[1]

The courts have always scrutinized the use of the mails at issue, recognizing that determining the applicability of Section 1341 "depends upon a careful examination of the evidence in each case to determine the contribution made by mailings to the scheme's success." *United States v. Kelem, supra;* see also, *United States v. Maze*, 468 F.2d 529 (6th Cir. 1972), *affirmed*, 94 S.Ct. 645 (1974). Thus,

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[1] It should be noted that during the relevant period there existed a full functioning office of the Department of Revenue in Kansas City itself. The office was established by statute. Section 32.040 R.S. Mo.

it has found statutory applicability where the use of the mails is a means of concealment enabling further frauds to be perpetrated. *United States v. Hendrickson*, 394 F.2d 807 (6th Cir. 1968), *cert. denied*, 393 U.S. 1031 (1969); *United States v. Riedel*, 126 F.2d 81 (7th Cir. 1942); *United States v. Lowe*, 115 F.2d 596, 599 (7th Cir. 1940), *cert. denied*, 311 U.S. 717. So also, where the delays caused by the mails are necessary to the accomplishment of the scheme. See, *e.g.*, *United States v. Kelem, supra; Suhl v. United States*, 390 F.2d 547 (9th Cir. 1968), *cert. denied*, 391 U.S. 964. And, where the mailings were utilized to "lull" the victims and thus enable the perpetrators to escape detection. *United States v. Sampson*, 371 U.S. 75 (1962); *United States v. Edwards*, 458 F.2d 875 (5th Cir. 1972). In the instant case, of course, none of these considerations came into play at all.

The Court's attention is called to the case of *United States v. Flaxman*, 495 F.2d 344 (7th Cir. 1974 (Pet. for Cert. filed in the Oct. Term, 1973)) in which the Seventh Circuit considered a virtually identical mailing and held that it was in furtherance of the scheme to defraud. For the reasons stated herein, petitioner submits that the Seventh Circuit's view is erroneous.

III.

THE COURT BELOW ERRED IN DENYING PETITIONER'S MOTION TO DISMISS THE INDICTMENT FOR SELECTIVE AND DISCRIMINATORY PROSECUTION.

Petitioner contends that his prosecution is based not upon the legitimate exercise of prosecutorial discretion, but rather upon the singling out of plaintiff for selective and discriminatory prosecution in violation of the First and

Fifth Amendments of the Constitution of the United States. See *United States v. Falk*, 479 F.2d 616, *en banc* (7th Cir. 1973); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

During the indictment period at least several thousand citizens of Missouri underpaid their use/sales taxes, utilizing the mails for transmittal, and yet only petitioner and two other persons of Italian descent were indicted under 18 U.S.C. §1341.[2]

The predicate for discounting the presumptive regularity of this prosection is, of course, contained within the four corners of the indictment itself. Petitioner submits that the application of the mail fraud statute to state tax transactions is at odds with nearly a century's custom, policy and practice on the part of the Department of Justice. With each of the fifty states of the Union deriving most of its revenues by taxation of its citizens and with the reliance upon the postal service as the ordinary method of transacting such business, it is obvious that the class of potential defendants is infinitely greater than the 25,000 cited by *United States v. Falk, supra.* Yet, petitioner's research has revealed only one reported decision, *United States v. Flaxman, supra,* involving such an application of the mail fraud statute. That case and those pending indictments in the Western District of Missouri represent the first such prosecutions in the long history of the mail fraud statute. These considerations, themselves, should suffice to raise a question about the legitimacy of the prosecutorial decision which has resulted in petitioner's indictment. However,

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[2] Those indictments are *United States v. Capra*, 73CR108W-2, 73CR209W-3-2, and *United States v. Brancato*, 73CR233W-2. Defendant Capra is a Kansas City, Mo. Councilman, and Defendant Brancato is a Missouri State Senator from Kansas City.

petitioner contends that two additional factors should be considered on the issue of selective prosecution.

For more than twenty years petitioner has operated a large and successful restaurant business in Kansas City, Mo. and admittedly, during a period prior to the indictment, the Federal Kansas City Strike Force suspected that certain persons involved in otherwise unidentified criminal activities were silent partners in said business.[3] Also the government questioned petitioner's association with people it believed were involved in criminal activity, most of whom were boyhood friends of petitioner.

The petitioner was called to testify before a grand jury concerning some of these matters and attempted to truthfully answer all questions put to him. But when his answers did not support the prosecutor's theory of the case, his wife was called to testify, which caused a violent verbal confrontation between petitioner and the prosecutor herein pertaining to the callous treatment she received in connection with her appearance. Thereafter, petitioner, his family and employees were the subject of an *intensive* investigation conducted by the prosecutor, utilizing the Federal Bureau of Investigation, Internal Revenue Service, Postal Authorities and Immigration Service. When all these agencies failed to find evidence of any federal wrongdoing involving petitioner, the prosecutor turned to this novel use of 18 U.S.C. §1341.

Petitioner's association with third parties, whether intentional or fortuitous, is clearly a right protected by the Constitution. The First Amendment's guarantee of the right

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[3] The government has since conceded that it had not developed any evidence to support this contention.

to peaceably assemble provides plenary freedom for a citizen to associate with those he chooses. If his selection for prosecution stemmed also in part from the prosecutor's belief that petitioner was withholding evidence from the Grand Jury or the FBI, there exist specific criminal sanctions which were adequate to the task. What a prosecutor cannot do is to engage in the fashioning of a dubious legal theory for the purpose of punishing a citizen for the sins of his friends. Nowhere have the courts been quicker to condemn abuse of prosecutorial discretion than where it has operated to abridge protected First Amendment rights. See, *Falk, supra; United States v. Crowthers,* 456 F.2d 1074 (4th Cir. 1972); *United States v. Steele,* 461 F.2d 1148 (9th Cir. 1972).

The Court held a pre-trial hearing on petitioner's Motion to Dismiss for Selective Prosecution and the prosecutor took the stand and was questioned concerning the organized crime designation of petitioner. First, the prosecutor acknowledged that petitioner was in fact placed upon an "organized crime" list by government agents whose identity he refused to disclose. He informed the Court that petitioner's identification as an organized crime subject was, in fact, transmitted to the Internal Revenue Service and the Federal Bureau of Investigation, but refused to reveal upon what, if any, evidence petitioner's identification was based.

While the prosecutor naturally denied any participation in a campaign of personal or official harassment of petitioner, he, nonetheless, revealed that as a result of his organized crime identification, his name, along with a number of others, was singled out for special tax investigation. That, in turn, triggered an audit of petitioner by the Internal Revenue agent attached to the prosecutor's staff, which, in turn, led to the inquiry into petitioner's

state sales tax records. All this, in spite of the prosecutor's denial of any personal knowledge that petitioner was in any way connected with organized crime.

When the consequences of such labeling are as far-reaching as a prosecution on theories which are applied to no other citizen, the basis for such stigmatization should not be left to nameless, faceless accusers who can neither be held accountable for their allegations, nor examined on the basis of their accusations. Surely if such characterization is permissible at all it raises elemental issues of due process of law which must be resolved. The due process aspects of such organized crime identification have been the subject of criticism already in the federal courts. See, *Masiello v. Norton*, 364 F. Supp. 1133 (D.C. Conn. 1973).[4] For the anonymous labeling is fraught to a dangerous extent with the possibilities of guilt by association which petitioner firmly believes to underlie his prosecution on this unprecedented charge.

The plaintiff submits that such an expansion of federal jurisdiction without the express or implied approval of Congress should not be permitted until it is reviewed by this Court.

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[4] Masiello, a federal prisoner, petitioned for a writ of habeas corpus, alleging that he was unlawfully denied parole. It was revealed that his application was given less favorable procedural treatment because Masiello bore a special "organized crime" label. He complained that elemental fairness required that he be given an opportunity to rebut the designation. The court, finding that the only basis for the labeling was "loosely-worded, unsupported assertions", granted Masiello "another parole hearing to contest the 'organized crime' label." *Id.* at 1137.

CONCLUSION

For the above and foregoing reasons, we respectfully submit that a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case.

Respectfully submitted,

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November, 1974

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 74-1367

United States of America, Appellee,	*	Appeal from the United States District Court for the Western District of Missouri.
v.	*	
Jasper J. Mirabile, Appellant.	*	

Submitted: September 9, 1974
Filed: October 15, 1974

Before VAN OOSTERHOUT, Senior Circuit Judge, HEANEY and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

The primary focus of this appeal is the federal mail fraud statute, 18 U.S.C. §1341 (1970). Issues have been raised regarding the scope of that statute and its applicability in the context of a state misdemeanor violation, namely, fraudulent misrepresentation of gross sales on sales/use tax returns. In addition, this appeal challenges the trial court's denial of a motion to dismiss on the basis of selective and discriminatory prosecution. We affirm.

Appellant Mirabile, owner and operator of a Kansas City, Missouri restaurant, was indicted by a federal grand jury in 1973. The indictment charged that Mirabile had devised and taken part in a scheme in which the gross retail sales of his restaurant were understated on the monthly sales/use tax returns that he caused to be mailed to the Missouri Department of Revenue. As a result, the state was defrauded of approximately $28,000 over a two and one-half year period. In *United States v. Mirabile*, 369 F. Supp. 1108 (W.D. Mo. 1974), the district court denied a motion to dismiss the indictment and held that federal jurisdiction under §1341 was proper. Subsequently, appellant was found guilty of mail fraud in a jury trial and placed on probation for five years.

The initial contention on appeal is that a scheme to defraud the state of Missouri by submitting false sales/use tax returns by mail is beyond the intended scope of §1341.[1] Appellant urges that the use of the mail fraud statute should be restricted to frauds involving federal injury and abuse of the Postal Service. It is argued that in furtherance

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[1] The statute, 18 U.S.C. §1341 (1970), provides, in relevant part, as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises * * * for the purpose of executing such scheme or artifice or attempting to do so * * * knowingly causes to be delivered by mail according to the directions thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any (matter or thing whatever to be sent or delivered by the Postal Service) shall be fined not more than $1,000 or be imprisoned not more than five years, or both.

of the intended purpose of the statute and in the interest of federal-state relations, all other fraud should be left to the states for enforcement. The fact that the statute has never been used in connection with fraudulent tax returns is, according to appellant, evidence of the error in the instant case.

However, the statute on its face is not limited in the manner suggested by the appellant; nor does it exempt the conduct in which appellant engaged. It clearly applies to "*any* scheme or artifice to defraud" in which the jurisdictional means (the mails) are employed. *United States v. States*, 488 F.2d 761, 764 (8th Cir. 1973). In the absence of a clear showing of contrary legislative intent, *National Railroad Passenger Corporation v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974), "the general rule of statutory construction requires the courts to ascertain the intent of legislation from the language used * * * if it is clear and plain and the act is internally cohesive." *Community Blood Bank v. F.T.C.*, 405 F.2d 1011, 1015 (8th Cir. 1969).

We must interpret the plain language of §1341 "broadly and liberally * * * to further the purpose of the statute; namely, to prohibit the misuse of the mails to further fraudulent enterprises." *United States v. States, supra* at 764. Such an interpretation is totally consistent with the ever-expanding role the mail fraud statute has played.

The diversity of schemes brought within the purview of §1341 illustrates the expansive reading that is generally given to that statute. *See, e.g., United States v. States, supra* at 764-65; *United States v. George*, 477 F.2d 508 (7th Cir.), *cert. denied*, 414 U.S. 827 (1973); *United States v. Edwards*, 458 F.2d 875 (5th Cir.), *cert. denied*, 409

U.S. 1029 (1972); *United States v. Shewfelt*, 455 F.2d 836 (9th Cir.), *cert. denied*, 406 U.S. 944 (1972); *United States v. Rosenblum*, 339 F.2d 473 (2d Cir. 1964). Thus, the contention that §1341 was not meant to cover the fraud in the instant case is not persuasive.[2]

Appellant argues that the application of §1341 in this case is an impermissible intrusion into state affairs. However, the fact that the underlying fraud here may violate state law does not exclude it from the proscription of the mail fraud statute. *Parr v. United States*, 363 U.S. 370, 389 (1960); *United States v. Flaxman*, 495 F.2d 344, 349 (7th Cir. 1974); *United States v. States*, *supra* at 767; *United States v. Edwards*, 458 F.2d 875, 880 (5th Cir.), *cert. denied*, 409 U.S. 1029 (1972).

Appellant's contention is premised upon a basic misinterpretation of the rationale behind the mail fraud statute. This court recently stated, "[t]he focus of the statute is upon the misuse of the Postal Service, not the regulation of state affairs, and Congress clearly has the authority to regulate such misuse of the mails." *United States v. States*, *supra* at 767. In this case, as in *States*, principles of federalism do not provide a basis for reversal.

Appellant also alleges that the mailings in this case were not an integral part of the scheme to defraud and therefore the fraud does not fall within the proscription of the mail fraud statute. We disagree. In *United States v. Nance*, ____ F.2d ____ (8th Cir. 1974), this court

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[2] We similarly reject appellant's attempt to equate the present case with *Sorrells v. United States*, 287 U.S. 435 (1932). The interpretation that we have given to §1341 produces neither the "absurd consequences" nor the "flagrant" injustice" that brought about the *Sorrells* entrapment doctrine. *Id.* at 446-52.

discussed the "use of the mails" requirement in connection with §1341 and stated:

> * * * To bring the scheme within the amibt of the mail fraud statute, the mails must be used for the purpose of executing the scheme, *Kann v. United States*, 323 U.S. 88, 93 (1944); must be employed before the scheme reaches fruition, *United States v. Maze*, 414 U.S. 395, 402 (1974); yet, need not be contemplated as an essential element of the scheme, *Pereira v. United States*, 347 U.S. 1, 8 (1954).

In the case before us, as in *United States v. Flaxman, supra* at 348-49, the fraud did not reach fruition until the tax forms were mailed to the state revenue authorities. This fact distinguishes the instant case from *United States v. Maze*, 414 U.S. 395 (1974), and brings apppellant's conduct in executing the fraud directly within the scope of §1341. *See United States v. Britton*, ____ F.2d ____ (8th Cir. 1974); *United States v. Miles*, ____ F.2d ____ (8th Cir. 1974); *United States v. Gaskill*, 491 F.2d 981, 984 (8th Cir. 1974).

Appellant's final contention is that the trial court erred in denying his motion to dismiss the indictment for selective and discriminatory prosecution. We disagree. The trial court conducted an evidentiary hearing during which appellant presented his evidence with respect to the motion. This included cross-examination of the prosecutor who voluntarily testified with respect to certain interrogatories propounded by appellant. Although appellant claims his questioning of the prosecutor was unduly circumscribed by the trial court, we find no abuse of discretion in this regard. *See United States v. Berrigan*, 482 F.2d 171, 179-82 (3d Cir. 1973). *Cf. United States v. Falk*, 479 F.2d 616,

619-24 (7th Cir. 1973). We are satisfied from an examination of the hearing record that the trial court was warranted in holding that there was insufficient evidence to support a finding of selective and discriminatory prosecution.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 74-1367. **September Term, 1974**

The United States, Appellee,	)	Appeal from the United States District Court for the Western District of Missouri.
v.	)	
Jasper J. Mirabile, Appellant.	)	

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

November 7, 1974